

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

BARRY EMMETT,

Plaintiff,

v.

TEXAS DEPARTMENT OF
CRIMINAL JUSTICE, et al.,

Defendants.

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Case No. 6:20-cv-655-JDK-KNM

**ORDER ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

Plaintiff Barry Emmett, proceeding pro se, brings this civil rights lawsuit under 42 U.S.C. § 1983. The case was referred to United States Magistrate Judge K. Nicole Mitchell pursuant to 28 U.S.C. § 636.

On January 4, 2021, Judge Mitchell issued a Report and Recommendation in this case. Docket No. 4. In that Report, Judge Mitchell found that Plaintiff accumulated at least three strikes prior to filing this lawsuit pursuant to 28 U.S.C. § 1915(g) and that Plaintiff had not shown imminent danger of serious physical injury. Accordingly, the Report recommended that the case be dismissed, with prejudice for the purpose of proceeding *in forma pauperis*, but without prejudice to refiling without seeking *in forma pauperis* status and upon payment of the full \$400.00 filing fee.

Where a party timely objects to the Report and Recommendation, the Court reviews the objected-to findings and conclusions of the Magistrate Judge de novo. 28 U.S.C. § 636(b)(1). In conducting a de novo review, the Court examines the entire


record and makes an independent assessment under the law. *Douglass v. United Servs. Auto. Ass’n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*), *superseded on other grounds by statute*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

While Plaintiff has not filed formal objections to the Report, he has submitted a 2014 lab report (Docket No. 5), a notice stating that he submitted medical records in Case No. 6:21-cv-2 (Docket No. 7), and a notice titled “life in danger” (Docket No. 8). The Court construes Plaintiff’s filings as objections to the Magistrate Judge’s Report. However, the records and documents Plaintiff furnished in this case and Case No. 6:21-cv-2 do not substantiate his conclusory claims of imminent danger at the time of filing the present case. *See Smith v. Blount*, 258 F.App’x 630 (5th Cir. 2007) (conclusory allegations are insufficient to show imminent danger for purposes of §1915(g)), *citing Baños v. O’Guin*, 144 F.3d 883, 885 (5th Cir. 1998); *James v. Lewis*, 776 F.App’x 242 (5th Cir. 2019) (same). Further, in his filings, Plaintiff specifically alleges “I haven’t been sick in eleven year and do not need anything.” Docket No. 8 at 5.

Having conducted a de novo review of the Magistrate Judge’s Report, Plaintiff’s objections, and the record in this case, the Court has determined that the Report of the Magistrate Judge is correct, and Plaintiff’s objections are without merit. Accordingly, the Court hereby **ADOPTS** the Report of the Magistrate Judge (Docket No. 4) as the opinion of the District Court. The Court **DENIES** Plaintiff’s motion to proceed *in forma pauperis* (Docket No. 2), and **DISMISSES** Plaintiff’s claims, with

prejudice for purposes of proceeding *in forma pauperis* under 28 U.S.C. § 1915(g), but without prejudice as to the refiling of his lawsuit without seeking *in forma pauperis* status. Finally, if Plaintiff pays the full filing fee within fifteen days of this Order, the lawsuit shall proceed as though the full filing fee had been paid from the outset

So **ORDERED** and **SIGNED** this **16th** day of **March, 2021**.



JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE